DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

HARRY FRANKLIN PHILLIPS,
Petitioner

vs.

STATE OF FLORIDA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
APPENDIX

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A

234 So.3d 547
Supreme Court of Florida.

Harry Franklin PHILLIPS, Appellant,
v.
STATE of Florida, Appellee.

No. SC17–984
|
[January 22, 2018]

Synopsis

Background: Motion was filed for post-conviction relief challenging death sentence following affirmance, 476 So.2d 194. The Circuit Court, Dade County, Nushin G. Sayfie, J., No. 131983cf0004350001XX, denied motion. Movant appealed.

[Holding:] The Supreme Court held that Supreme Court's *Hurst v. Florida*, 136 S.Ct. 616, decision invalidating Florida's capital sentencing scheme did not apply retroactively to sentence of death that became final in 1998.

Affirmed.

Pariente, J., concurred in result and filed statement.

Lewis and Canady, JJ., concurred in result.

***548** An Appeal from the Circuit Court in and for Dade County, Nushin G. Sayfie, Judge—Case No. 131983CF0004350001XX

Attorneys and Law Firms

Neal Dupree, Capital Collateral Regional Counsel, William Hennis, and Marta Jaszczolt, Assistant Capital Collateral Regional Counsel, Southern Region, Ft. Lauderdale, Florida, for Appellant

Pamela Jo Bondi, Attorney General, and Melissa J. Roca, Assistant Attorney General, Miami, Florida, for Appellee

Opinion

PER CURIAM.

We have for review Harry Franklin Phillips' appeal of the circuit court's order denying Phillips' motion filed pursuant to Florida Rule of Criminal Procedure 3.851. This Court has jurisdiction. See art. V, § 3(b)(1), Fla. Const.

Phillips' motion sought relief pursuant to the United States Supreme Court's decision in Hurst v. Florida, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and our decision on remand in Hurst v. State (Hurst), 202 So.3d 40 (Fla. 2016), cert. denied, —— U.S. ——, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017). This Court stayed Phillips' appeal pending the disposition of Hitchcock v. State, 226 So.3d 216 (Fla. 2017), cert. denied, —— U.S. ——, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017). After this Court decided Hitchcock, Phillips responded to this Court's order to show cause arguing why Hitchcock should not be dispositive in this case.

After reviewing Phillips' response to the order to show cause, as well as the State's arguments in reply, we conclude that Phillips is not entitled to relief. Phillips was sentenced to death following a jury's recommendation for death by a vote of seven to five. Phillips v. State, 705 So.2d 1320, 1321 (Fla. 1997). Phillips' sentence of death became final in 1998. Phillips v. Florida, 525 U.S. 880, 119 S.Ct. 187, 142 L.Ed.2d 152 (1998). Thus, Hurst does not apply retroactively to Phillips' sentence of death. See Hitchcock, 226 So.3d at 217. Accordingly, we affirm the denial of Phillips' motion.

The Court having carefully considered all arguments raised by Phillips, we caution that any rehearing motion containing reargument will be stricken. It is so ordered.

LABARGA, C.J., and QUINCE, POLSTON, and LAWSON, JJ., concur.

PARIENTE, J., concurs in result with an opinion.

LEWIS and CANADY, JJ., concur in result.

PARIENTE, J., concurring in result.

I concur in result because I recognize that this Court's opinion in Hitchcock v. State, 226 So.3d 216 (Fla. 2017), cert. denied, —— U.S. ——, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017), is now final. However, I continue to adhere to the views expressed in my dissenting opinion in Hitchcock.

All Citations

234 So.3d 547, 43 Fla. L. Weekly S22

B

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

v.

HARRY FRANKLIN PHILLIPS,
Defendant.
_____/

CASE NO.: CASE NO. F83-435
DIVISION: F061
JUDGE NUSHIN G. SAYFIE

ORDER DENYING SUCCESSIVE MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE

This cause having come before the court on Defendant's Successive Motion to Vacate Judgment of Conviction and Sentence, and the court having reviewed the Defendant's motion filed on 2/23/16, the Amendment to the motion filed on 3/7/17, the State's Answer filed on 4/6/17, the Defendant's Notice of Supplemental Authority filed on 4/18/17, and having heard arguments of the parties at a *Huff* hearing, on April 20, 2017, finds as follows:

In his motion and amended motion the Defendant seeks to vacate his death sentence pursuant to *Hurst v. Florida*, 136 S.Ct. 616 (2016). He claims that his sentence, under the now unconstitutional Florida Death Penalty Statute, violates the 6th Amendment (claim I) and the 8th Amendment (claim II). He also argues that *Hurst* should be applied to him retroactively (claim III) and that he should be permitted to relitigate all of his previously denied postconviction motions (claim IV).

The Florida Supreme Court held in *Asay* v. State, 210 So. 3d 1, (Fla. 2016), that *Hurst* does not apply retroactively to death sentences that were final before *Ring*. *Id.*, at 22. (*See also Rodriguez v. State*, 2017 WL 1409668). Therefore, as to claims I, II & III, the Defendant's motion is denied.

As to claim IV, Defendant contends he is entitled to relitigate his previous *Atkins* claim pursuant to *Hurst*. At the *Huff* hearing, counsel stated he raised this claim in this motion to preserve his due diligence and would file a separate motion pursuant to, *Hall v. Florida*, 134 S.Ct. 1986 (2014) and *Walls v. State*, 2016 WL 6137287 to raise the issue of

intellectual disability. As such, this claim is denied without prejudice giving the Defendant leave to timely file motion.

WHEREFORE, it is ORDERED AND ADJUDGED that Defendant's Successive Amended Motion for Postconviction Relief is DENIED.

Done and Ordered in Miami-Dade County this 21st day of April, 2017.

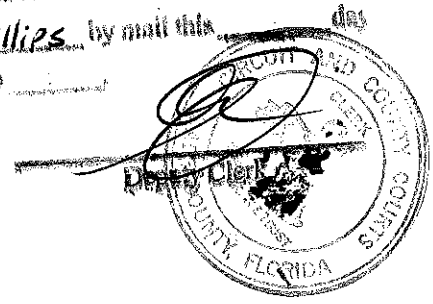
Nushin G Sayfie
Circuit Court Judge

Copies to:

William Hennis III, counsel for Defendant
Marta Jaszczolt, counsel for Defendant
Melissa J. Roca, AAG
Christine Zahralban, ASA

CERTIFY that a copy of this order has been furnished to the MOVANT, Harry F. Phillips, by mail this ____ day of APR 27 2017

Deputy Clerk



C

Supreme Court of Florida

WEDNESDAY, SEPTEMBER 27, 2017

CASE NO.: SC17-984
Lower Tribunal No(s).:
131983CF0004350001XX

HARRY FRANKLIN PHILLIPS vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant shall show cause on or before Tuesday, October 17, 2017, why the trial court's order should not be affirmed in light of this Court's decision Hitchcock v. State, SC17-445. The response shall be limited to no more than 20 pages. Appellee may file a reply on or before Wednesday, November 1, 2017, limited to no more than 15 pages. Appellant may file a reply to the Appellee's reply on or before Monday, November 13, 2017, limited to no more than 10 pages.

Motions for extensions of time will not be considered unless due to a medical emergency.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

tw
Served:

WILLIAM M. HENNIS III
MELISSA J. ROCA

D

IN THE SUPREME COURT OF FLORIDA

HARRY FRANKLIN PHILLIPS,

Appellant,

Case No.: SC17-984

v.

STATE OF FLORIDA,

Appellee.

_____/

RESPONSE TO ORDER TO SHOW CAUSE

The Appellant, **HARRY FRANKLIN PHILLIPS**, by and through undersigned counsel, hereby responds to this Court's September 27th Order to Show Cause why the trial court's order should not be affirmed in light of this Court's decision in *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017). In support thereof, Mr. Phillips states:

A. Introduction.

Mr. Phillips is under a sentence of death and is appealing the circuit court's summary denial of his successive Rule 3.851 motion. As an initial matter, Mr. Phillips submits that his appeal is not one subject to this Court's discretionary jurisdiction. *See* Fla. R. App. Pro. 9.030 (a) (2). Mr. Phillips is exercising a substantive right to appeal the denial of his successive Rule 3.851 motion. *See* Fla. Stat. § 924.066 (2016); Fla. R. App. Pro. 9.140(b)(1)(D). Because he has been provided this substantive right, Mr. Phillips's right to appeal is protected by the Due

Process and Equal Protection Clauses of the Fourteenth Amendment. *Evitts v. Lucy*, 469 U.S. 387, 393 (1985) ("if a State has created appellate courts as "an integral part of the …system for finally adjudicating the guilt or innocence of a defendant," *Griffin v. Illinois*, 351 U.S. at 18, 76 S.Ct., at 590, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution."). This principle applies to collateral appeals as well as direct appeals. *Lane v. Brown*, 372 U.S. 477, 484-85 (1963) ("the *Griffin* principle also applies to state collateral proceedings, and *Burns* leaves no doubt that the principle applies even though the State has already provided one review on the merits.").

This Court's *sua sponte* order staying these proceedings pending the disposition of *Hitchcock* indicates this Court intends to bind Mr. Phillips to the outcome rendered in *Hitchcock*'s appeal, regardless of the fact the record on appeal in each case is distinct and separate from one another. While this practice is common in discretionary appeals, it is an anathema to individualized capital proceedings that must comport with the Eighth Amendment. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978) ("we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases."). The individualized appellate review is necessary to insure

Florida's capital sentencing scheme complies with the Eighth Amendment. *See Proffitt v. Florida*, 428 U.S. 242, 258 (1976) ("The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases.").

Because Mr. Hitchcock has now lost his appeal, this Court's order to show cause severely curtails the appellate process in Mr. Phillips's appeal of right.[1] This threat to Mr. Phillips's right to appeal and be meaningfully heard implicates his right to due process and equal protection, particularly given that the constitutional arguments Mr. Phillips raised in his 3.851 proceedings are different from those set out in Mr. Hitchcock's briefing. A denial of Mr. Hitchcock's appeal should not govern the issues that are present in Mr. Phillips's appeal.[2]

Importantly, the procedure that this Court unveiled for use in Mr. Phillips's case was not employed in *Hitchcock v. State*. There was no requirement there that Mr. Hitchcock show "cause"; indeed, his appeal proceeded under the standard Florida Rules of Appellate Procedure. Mr. Hitchcock was permitted to have counsel brief

[1] Fla. R. App. Pro. 9.140(i) provides that this Court "**shall** review all rulings and orders appearing in the record necessary to pass upon the grounds of an appeal." Yet this Court has *sua sponte* decided that Mr. Phillips is only entitled to the standard appellate process, which includes the right to file an Initial Brief of 75 pages in length, if he can first satisfy some unknown "cause" standard.

[2] A petition for a writ of certiorari is currently pending in *Hitchcock v. Florida* (No. 17-6180) and is scheduled for conference on December 1, 2017. The pending petition for certiorari demonstrates that the issues in *Hitchcock* are unresolved.

his issues. And after the decision in *Hitchcock* issued, Mr. Hitchcock had the right to have his counsel file a motion for rehearing on which the Florida Rules of Appellate Procedure place no page limits. There is no doubt that undersigned counsel on behalf of Mr. Phillips would have taken advantage of the right to file a motion for rehearing to explain that this Court's ruling in *Hitchcock* raised more questions than it answered with regard to the constitutionality of Florida's capital sentencing scheme under the Eighth and Fourteenth Amendments.

Accordingly, Mr. Phillips objects to the requirement that he show "cause" before his appeal of right can proceed on the basis of the Florida Constitution, on the basis of the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and on the basis of the Eighth Amendment. "The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Hall v. Florida*, 134 S. Ct. at 2001. Mr. Phillips respectfully moves the Court for full briefing and oral argument in accordance with the standard rules of appellate procedure.

B. Mr. Phillips's Rule 3.851 Motion.

Mr. Phillips is appealing the circuit court's summary denial of his successive Rule 3.851 motion. On March 7, 2017, Mr. Phillips's filed an amended motion for

postconviction relief, raising four separate claims.[3] Claim I rested on the Sixth Amendment and the decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016). Claim II rested on the Eighth Amendment, the Florida Constitution, and this Court's ruling in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), that before a death sentence could be authorized the jury must first return a unanimous death recommendation. Claim III was premised upon the arbitrariness of the distinction this Court made in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), and *Asay v. State*, 210 So. 3d 1 (Fla. 2016), between death sentences final before June 24, 2002, and those that became final after June 24, 2002. The arbitrariness of the distinction meant that his death sentence stood in violation of *Furman v. Georgia*, 408 U.S. 238 (1972). Claim IV asserted that the rejection of Mr. Phillips's previously presented *Brady*/*Giglio*, *Strickland*, and *Atkins*/*Hall* claims could not stand because *Hurst v. State* and *Perry v. State* gave him a retrospective right to a life sentence unless a jury returns a unanimous death recommendation.[4]

C. Mr. Phillips should not be factually or legally bound by *Hitchcock*.

[3] Mr. Phillips filed a Rule 3.851 motion on February 23, 2016 following *Hurst v. Florida*. The motion was amended March 7, 2017, and March 31, 2017 to include briefing on subsequent developments in the law.

[4] In addition, on March 31, 2017, Mr. Phillips filed an amendment premised upon the substantive change in law resulting from the enactment of Chapter 2017-1 by the Florida Legislature. *See* instant Record at 198-207. Subsequently, after allowing the amendment during the case management conference, the circuit court summarily denied it. *See* instant Record at 296, 312.

Mr. Phillips challenges his death sentence on the basis of the conclusion in *Hurst v. State* that a death sentence flowing from a non-unanimous death recommendation lacks reliability. This argument is different than the argument presented in *Hitchcock* and establishes that Mr. Phillips should get *Hurst* relief.

In *Hitchcock v. State*, this Court wrote:

> We have consistently applied our decision in *Asay*, denying the retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* to defendants whose death sentences were final when the Supreme Court decided *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

2017 WL 3431500 at *1. Purporting to address Hitchcock's arguments, the Court concluded as follows:

> Although Hitchcock references various constitutional provisions as a basis for arguments that *Hurst v. State* should entitle him to a new sentencing proceeding, these are nothing more than arguments that *Hurst v. State* should be applied retroactively to his sentence, which became final prior to *Ring*. As such, **these arguments were rejected when we decided *Asay*.**

Hitchcock, 2017 WL 3431500, at *2. (emphasis added). That is the extent of this Court's decision in *Hitchcock v. State*. Yet, this Court's premise that Mr. Hitchcock's issues were decided by *Asay* is belied by facts. Most significantly, it is impossible that the retroactivity of the constitutional right to a life sentence unless a jury returned a unanimous death recommendation which was recognized in *Hurst v.*

State on the basis of the Eighth Amendment and the Florida Constitution could have been decided in *Asay*: the issue was not raised or at issue there.[5]

For the adversarial process to properly function, it is axiomatic that courts must only decide issues that were briefed. This way, adversaries have the opportunity to explain to the court the positive and negative impact that would occur should their respective position prevail. As explained by the United State Supreme Court:

> The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them. In this case, petitioners did not ask us to hold that there is no constitutional right to informational privacy, and respondents and their amici thus understandably refrained from addressing that issue in detail. It is undesirable for us to decide a matter of this importance in a case in which we do not have the benefit of briefing by the parties and in which potential amici had little notice that the matter might be decided.

Nat'l Aeronautics and Space Admin. V. Nelson, 532 U.S. 134, 147 n.10 (2011) (internal citations omitted). Because undersigned counsel were not counsel for Mr. Hitchcock and because this Court declined to analyze the other "various

[5] After the October 14, 2016 issuance of *Hurst v. State* and before the December 22, 2016 decision in *Asay v. State*, Mr. Asay did not present any arguments on the basis of *Hurst v. State*, the Eighth Amendment, or the Florida Constitution. In addition, Mr. Asay made no arguments regarding the retroactivity of *Hurst v. State.*

constitutional provisions" cited by *Hitchcock*, *Hitchcock* does not foreclose relief. *Hitchcock*, 2017 WL 3431500, at *2.

In Claim I, a Sixth Amendment claim based upon *Hurst v. Florida*, Mr. Phillips seeks to argue that this Court's rulings in *Asay* and *Mosley* abandoning the binary nature of the balancing test set forth in *Witt v. State*[6] means that each defendant with a pre-*Ring* death sentence is entitled to receive what Mr. Asay received—a case specific balancing of the *Witt* factors. Mr. Phillips has strong case specific reasons why the *Witt* balancing test tips in his favor, which he intends to articulate if granted full briefing.[7]

Claim II of Mr. Phillip's Rule 3.851 is based upon the right to a life sentence unless a properly-instructed jury unanimously recommends a death sentence recognized in *Hurst v. State*. It establishes a presumption of a life sentence that is the equivalent of the guilt phase presumption of innocence. This Court recognized that the requirement that the jury must unanimously recommend death before this

[6] 387 So. 2d 922 (Fla. 1980).

[7] While both Mr. Hitchcock and Mr. Phillips have raised issues as to the *Witt* analysis that was conducted in *Asay v. State* regarding *Hurst v. Florida*, the argument made in the initial brief in *Hitchcock v. State* quickly diverges from the claims that Mr. Phillips asserted in his 3.851 motion. Put simply, the *Hitchcock* brief does not seem to view *Hurst v. Florida* and *Hurst v. State* as involving distinctly different constitutional claims. To preclude Mr. Phillips from making his arguments in an initial brief in compliance with the standard rules governing appellate procedures when Mr. Hitchcock has been afforded the very opportunity that is being denied to Mr. Phillips violates equal protection.

presumption of a life sentence can be overcome does *not* arise from the Sixth Amendment, from *Hurst v. Florida*, or from *Ring v. Arizona*. Rather, it is a right emanating from the Florida Constitution and the Eighth Amendment.

The requirement that the jury unanimously vote in favor of a death recommendation before a death sentence is authorized was embraced as a way to enhance the reliability of death sentences. *Hurst v. State*, 202 So. 3d at 59 ("We also note that the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty.). *See Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) ("The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case.").

In holding that requiring unanimity would produce more reliable death sentences, this Court has acknowledged that death sentences imposed without the unanimous support of a jury lacked the requisite reliability:

> After our more recent decision in *Hurst*, 202 So. 3d 40, where we determined that a reliable penalty phase proceeding requires that "the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed," 202 So. 3d at 59, we must consider whether the unpresented mitigation evidence would have swayed one juror to make "a critical difference." *Phillips*, 608 So. 2d at 783.

Bevel v. State, 221 So. 3d 1168, 1182 (Fla. 2017). This Court's recognition that "a reliable penalty phase requires" a unanimous jury death recommendation by a properly-instructed jury means that the death recommendation provided by Mr. Phillips's jury does not qualify as reliable. In *Mosley v. State*, this Court noted that the unanimity requirement in *Hurst v. State* carried with it "heightened protection" for a capital defendant. *Id*., 209 So. 3d at 1278. This Court stated in *Mosley* that *Hurst v. State* had "emphasized the critical importance of a unanimous verdict." *Id*. This Court added:

> In this case, where the rule announced is of such fundamental importance, the interests of fairness and "cur[ing] **individual injustice**" compel retroactive application of *Hurs*t despite the impact it will have on the administration of justice. *State v. Glenn*, 558 So.2d 4, 8 (Fla. 1990).

Mosley v. State, 209 So. 3d at 1282 (emphasis added). *Hurst v. State* recognized that the non-unanimous recommendation demonstrates that Mr. Phillips's death sentence lacks the heightened reliability demanded by the Eighth Amendment. *Hurst v. State*, 202 So. 3d at 59 ("the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty.").

An examination of Mr. Hitchcock's initial brief shows that the focus of his arguments is actually on *Hurst v. Florida* and the Sixth Amendment right to a jury verdict as to the imposition of a death sentence. His Summary of the Argument

focuses only on *Hurst v. Florida*; it does not mention *Hurst v. State*. Argument IV of Mr. Hitchcock's initial brief does raise an Eighth Amendment argument arising from *Hurst v. State*, but focuses on the evolving standards of decency. In *Hurst v. State*, this Court found that there existed a national consensus that death sentences should only result when a jury unanimously consented to its imposition. *Id*., 202 So. 3d at 61. While there is a basis for Mr. Hitchcock's argument within *Hurst v. State*, it is not the Eighth Amendment argument and Florida Constitution argument that Mr. Phillips will be making.

Although there is some overlap with Mr. Hitchcock's arguments, the indicia of unreliability present here was not present or addressed in *Hitchcock v. State*. Indeed, all of Mr. Phillips's arguments are underscored by the numerous errors that occurred at his capital penalty phase which, in light of the cataclysmic shift in the law, establish that his death sentence is incurably unreliable. For instance, Mr. Phillips's jury was exposed to incurably prejudicial information that was not at issue in *Hitchcock v. State*.[8] At Mr. Phillips's resentencing,[9] the trial court informed the jury:

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[8] It should be noted that in *Hitchcock v. State*, 673 So. 2d 859, 863 (Fla. 1996), this Court remanded for a new penalty phase because the trial court's improper comments to the jury at resentencing "could have [had] the effect of preconditioning the present jury to a death a sentence."

[9] This Court vacated Mr. Phillips's first death sentence and remanded for a new penalty phase due to ineffective assistance of counsel at the sentencing phase of trial. *Phillips v. State*, 608 So. 2d 778 (Fla. 1992).

> This is a little unusual case in that we are on the penalty phase of a First Degree Murder case, that means that the defendant has already been found guilty of First Degree Murder by a different jury and **for legal technicalities we have to retry the penalty phase.** (R. 82-83) (emphasis added).

The mishandling of the jury, however, did not stop there, the trial judge also instructed:

> "**[i]t's not your duty** to advise the court as to what punishment should be imposed upon the defendant for his crime of first degree murder. As you were told **I will decide what punishment shall be imposed**. It's the responsibility of the Judge" (R. 787) (emphasis added).[10]

In *Caldwell v. Mississippi*, the United States Supreme Court held it is constitutionally impermissible to rest a death sentence on a determination made by a jury that was "led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328-29.[11] Here, not only did the court diminish the jury's role by explicitly informing the jury

[10] In addition, the trial court explicitly instructed the jury that "[f]eelings of prejudice, bias or mere sympathy are not legally reasonable doubts and they should not be discussed by any of you in any way" (R. 795).

[11] While this Court has previously rejected *Caldwell* challenges (including Mr. Phillips's) in the context of the prior sentencing scheme, three justices of the United States Supreme Court recently dissented from a denial of certiorari because of this Court's appellate review of issues arising in the wake of *Hurst v. Florida*. *See Truehill v. Florida*, 2017 WL 2463876 (October 16, 2017) (Sotomayor, J., dissenting, joined by Breyer and Ginsburg, JJ.) ("capital defendants in Florida have raised an important Eighth Amendment challenge to their death sentences that the Florida Supreme Court has failed to address.").

that the final decision rested solely with the judge, but the deliberative process was further undermined by the judge's improper commentary. After retiring to deliberate, the jury returned with several questions, and the court agreed that the instructions had been confusing and improper, and reinstructed the jury about voting procedures (R. 803). The jury once again retired to deliberate and returned without reaching a decision. The following day, the jury returned to deliberate and sent a note to the judge indicating that two jurors were declining to vote, i.e., that a verdict could not be reached (R. 810). The judge brought the jury in and told them to take a vote, even if from only ten of the jurors, and to "[p]ut on the vote as it stands" (R. 811). **Six minutes later**, the jury returned with a recommendation, by a vote of 7 to 5, to impose death (R. 812).

The unreliability of the proceedings giving rise to Mr. Phillips's death sentence is clear on the face of the record. At the *Spencer*[12] hearing, the judge showed up with a sentencing order prepared in hand. *See* R. 826-46. The order indicated the trial court found the four aggravating[13] factors that the jury was instructed on but found neither of the two statutory mitigators applied. On direct

[12] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

[13]The court acknowledged that although "[t]his Court previously found [the disrupt/hinder] factor inapplicable because the court believed that the homicide was committed for revenge. However, the Court submits that although revenge may have been one motive, it was part of the overall motive of killing a parole officer… Mr. Svenson's only connection with the defendant was as parole officer and parolee" (R. 831). However, Mr. Svenson was not Phillips's parole officer.

appeal, this Court found the *Spencer* claim procedurally barred because of trial counsel's failure to properly object at trial[14], but nonetheless this Court acknowledged the trial judge's error in "adopt[ing] almost verbatim the State's earlier-filed sentencing memorandum as his sentencing order." *Phillips v. State*, 705 So. 2d 1320 (Fla. 1997) (Anstead, J. concurring). Given this Court's acknowledgment of error and the fact that the jury did not return any written findings, it cannot be said that the sentencing order reflects the jury's fact-finding.[15] As the United States Supreme Court explained in *Caldwell*, "there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court." *Id.* at 330. Here, the trial court's failure to follow sentencing procedures, coupled with its improper commentary, further compounds the prejudice to Mr. Phillips and demonstrates specific reasons why the jury's 7-5 recommendation for death is incurably unreliable.

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[14] While this Court found Mr. Phillips's claim procedurally barred because of trial counsel's failure to object and preserve the issue, this Court did not attribute any error to trial counsel.

[15] Judge Snyder's commentary prior to reading the sentencing order provides further support for this contention. *See* R. 825 ("It's interesting in this case that the jury verdict was 7-5 in both cases … I don't know that I would even accept the jury verdict of 12 nothing for life imprisonment. I really don't. I had a fellow by the name of famous Stacy Weinstein case. Bosco. Jury voted 12 nothing give him life imprisonment, and I gave him the death penalty. It was reversed. Not on the case, but that he was given life. There are certain crimes that you must send a message to the community").

Again, Mr. Phillips seeks to challenge his death sentence on the basis of *Hurst v. State*—that a death sentence flowing from a death recommendation in which the jury was not required to return a unanimous verdict on all findings of fact lacks reliability. This is a different argument than the one presented by Mr. Hitchcock, and it provides a much different and stronger argument that Mr. Phillips should get the retroactive benefit of *Hurst v. State*. The importance of the heightened reliability demanded by the Eighth Amendment was found in *Mosley* to be of such fundamental importance that this Court abandoned the binary approach to *Witt*. As indicated in *Mosley*, the *Witt* analysis in the context of *Hurst v. State* requires consideration of the need to cure "individual injustice." Unlike Mr. Hitchcock, Mr. Phillips will argue that under the case by case *Witt* analysis which *Mosley* said was required, the layers of unreliability and identified errors in Mr. Phillip's penalty phase show "individual injustice" in need of a cure. The disposition of Mr. Hitchcock's appeal and arguments therein did not address the "individual injustice" present in Mr. Phillips's case. Thus, *Hitchcock* cannot govern or control the outcome on the issue being raised in Mr. Phillips's appeal.

In addition to addressing *Hurst v. Florida* and *Hurst v. State* under *Witt*, Mr. Phillips intends to argue that fundamental fairness (as identified and discussed in *Mosley v. State*) and the manifest injustice exception to the law of the case doctrine set forth in *Thompson v. State*, 208 So. 3d 49, 50 (Fla. 2016), apply and require that

Mr. Phillips receive the benefit of *Hurst v. Florida* and *Hurst v. State*. Under both "fundamental fairness" and "manifest injustice," collateral relief is warranted.

Specifically, as to the fundamental fairness concept set forth in *Mosley*, Mr. Phillips detailed his case specific reasons why the "fundamental fairness" concept, which this Court embraced and employed in *Mosley*, meant that he should receive collateral relief in light of *Hurst v. Florida* and/or *Hurst v. State*. In *James v. State*, 615 So. 2d 668 (Fla. 1993), this Court cited "fundamental fairness" when it granted a resentencing. It found a case specific demonstration of fundamental unfairness entitled Mr. James to collateral relief due to the decision in *Espinosa v. Florida*, 505 U.S. 1079 (1992). Because of Mr. James' efforts to challenge the jury instruction on heinous, atrocious or cruel in anticipation of *Espinosa*, this Court held that "it would not be fair to deprive him of the Espinosa ruling" even though Mr. James' death sentence was final years before *Espinosa* was issued by the United States Supreme Court. *James v. State*, 615 So. 2d at 669.

Other collateral appellants appearing before this Court with death sentences that were final before *Espinosa* issued were generally unable to make the showing of unfairness that Mr. James made. Very few of those with death sentences final before the issuance of *Espinosa* received collateral relief on the basis of *Espinosa*. The ruling in *Espinosa* was not found retroactive under *Witt v. State*. The collateral benefit was extended only on a case by case basis to those like Mr. James who

showed their case specific entitlement to the retroactive benefit of *Espinosa* using fundamental fairness as the yardstick. Just as Mr. James made a successful case specific showing of fundamental unfairness while others did not, Mr. Phillips's case specific showing of fundamental unfairness cannot be controlled by the *Hitchcock* decision as it was not an issue raised in Mr. Hitchcock's case. Whether "fundamental fairness" warrants collateral relief in Mr. Phillips's case can only be resolved after a full review of the record in Mr. Phillips's case, not a review of the record in Mr. Hitchcock's case.

In Claim III of his 3.851 motion, Mr. Phillips challenged the Court's arbitrary bright line cutoff that resulted from *Mosley* and *Asay*. Mr. Phillips contends that the cutoff set at June 24, 2002 is so arbitrary as to violate the Eighth Amendment principles enunciated in *Furman v. Georgia*. In *Furman*, the U.S. Supreme Court found that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *see also Furman*, 408 U.S. at 239-40. In separating those who are to receive the retroactive benefit of *Hurst v. Florida* and/or *Hurst v. State* from those who will not, the line drawn operates much

the same as the IQ score of 70 cutoff at issue in *Hall v. Florida*, 134 S. Ct. 1986 (2014).[16]

Claim III is premised upon the Eighth Amendment and its requirement that a death sentence carry extra reliability in order to insure that it was not imposed arbitrarily. Heightened reliability in capital cases is a core value of the Eighth Amendment and *Furman v. Georgia*. In *Hurst v. State*, this Court held that enhanced reliability warranted the requirement that a death recommendation be returned by a unanimous jury. In doing so, the Court effectively recognized that a death sentence without the unanimous consent of the jury was lacking in reliability and thus did not carry the heightened reliability required by the Eighth Amendment. It is within that context that Mr. Phillips will argue in his appeal that if this Court's decision in *Mosley* and *Asay* established a bright line cutoff as to the date at which the State's interest in finality trumped the interests of fairness and curing individual injustice, such a bright line cutoff violated the Eighth Amendment principle set forth in *Hall v. Florida*.[17] Mr. Hitchcock did not make this argument as to the retroactive benefit

[16] Just as there were death sentenced individuals on the wrong side of the 70 IQ score cutoff who were likely intellectually disabled and erroneously under sentence of death, there are individuals with pre-*Ring* death sentences that rest on proceedings layered in error and/or outdated science and/or discredited forensic evidence such that the cumulative unreliability rises up to trump the State's interest in finality.

[17] It should be obvious that although this Court found the State's interest in finality increases the older a case is, the older case will often have greater unreliability due to advances in science and improvements in the quality of the representation in capital cases over time.

of *Hurst v. State* being arbitrarily limited by a bright line cutoff in violation of the Eighth Amendment. And, certainly, this Court did not address this issue in its opinion denying Mr. Hitchcock relief.

Finally, Claim IV is premised on the fact that if a resentencing is ordered, Mr. Phillips will have a right to a life sentence unless the jury returns a unanimous death recommendation. This Court found in *Bevel v. State*, 221 So. 3d 1168 (Fla. 2017), that *Hurst v. State* required adjustment to the prejudice analysis of *Brady*/*Giglio* claims and *Strickland* claims Accordingly, this claim asks how this affects the validity of this Court's rejection of Mr. Phillips's *Brady*/*Giglio*, *Strickland*, and *Atkins*/*Hall* claims in his previous motions to vacate.

Throughout his appellate and collateral proceedings, Mr. Phillips has pointed to numerous ways in which the State withheld evidence and used false testimony, all which have been denied on the basis that no prejudice has been shown. Mr. Phillips also alleged that trial counsel rendered ineffective assistance of counsel at the penalty phase for, among other reasons, failing to present mitigation, including evidence of intellectual disability. Certainly the previous rejection of *Strickland* claims or *Brady*/*Giglio* claims on the basis of a defendant's failure to show prejudice (i.e. a reasonable likelihood that six jurors would vote for a life sentence) no longer comports with the law since Florida law now provides that if only one juror votes for a life sentence, a life sentence must be imposed. *Strickland* and *Brady* prejudice

analysis requires a determination of whether confidence in the reliability of the outcome –the imposition of a death sentence – is undermined by the evidence the jury did not hear due to the *Strickland* and/or *Brady* violations. The new Florida law should be part of the evaluation of whether confidence in the reliability of the outcome is undermined.

Given that Mr. Phillips's previous jury did not return a unanimous death recommendation, it is probable that in light of the evidence developed in collateral proceedings that will be admissible, Mr. Phillips will receive a sentence of less than death. Due to the arbitrary line this Court has drawn in the course of deciding *Mosley* and *Asay,* Mr. Phillips's death sentence is inherently more unreliable. This specific claim raised by Mr. Phillips was simply not raised by Mr. Hitchcock or addressed by this Court. Claim IV is a case specific claim requiring a case by case analysis.

The specific issues raised by Mr. Phillips were not decided by this Court in *Hitchcock*, or in *Asay*. Due process requires that Mr. Phillips have the opportunity for full briefing and an individualized analysis of his claims. Mr. Phillips asks this Court to allow oral argument and full briefing on the issues resulting from the circuit court's summary denial of his Rule 3.851 motion. In the alternative, Mr. Phillips asks this Court to apply the *Hurst* decisions retroactively to him, vacate his death sentence, and remand to the circuit court for a new penalty phase that comports with the Sixth, Eighth and Fourteenth Amendments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been filed through the Florida State Courts e-filing portal which electronically sent a copy to Melissa Roca, Assistant Attorney General, on November 16, 2017.

/s/ William M. Hennis III
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Litigation Director

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IN THE SUPREME COURT OF THE STATE OF FLORIDA

HARRY FRANKLIN PHILLIPS,

Appellant,

v.

Case No. SC17-984
Lower Tribunal No. F-83-435
Death Penalty Case

STATE OF FLORIDA,

Appellee.
_____/

STATE'S REPLY TO APPELLANT'S MOTION TO SHOW CAUSE

COMES NOW, APPELLEE, the State of Florida, by and through the undersigned counsel, and submits this reply to Appellant's Response to this Court's September 25, 2017, Order to Show Cause and submits that this Court should affirm the circuit court's order denying Appellant post-conviction relief in accordance with this Court's precedent in Asay v. State, 210 So. 3d 1 (Fla. 2016), and Hitchcock v. State, SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017).

RELEVANT FACTS AND PROCEDURAL HISTORY

Appellant, HARRY FRANKLIN PHILLIPS, was convicted of the first-degree murder of Bjorn Thomas Svenson, and was sentenced to death in 1994. Phillips v. State, 705 So. 2d 1320 (Fla. 1997). The judgment and sentence became final upon denial of certiorari by the United States Supreme Court on October 5,

1998. Phillips v. Florida, 525 U.S. 880 (1995); Fla. R. Crim. P. 3.851(d)(1)(B) (A judgment and sentence become final "on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed.").

On March 7, 2017, Phillips filed his amended successive motion for postconviction relief arguing that he was entitled to relief following this Court's decision in Hurst v. State, 202 So. 3d 40 (Fla. 2016). On April 21, 2017, the postconviction court denied Phillips's motion for postconviction relief holding that because his sentence was finalized prior to Ring v. Arizona, 536 U.S. 584 (2002), the postconviction court was bound by this Court's decision in Asay. On May 19, 2017, Phillips appealed the postconviction court's decision to this Court. On September 27, 2017, this Court ordered Phillips to show cause as to why he should be entitled to relief following this Court's Hitchcock decision. This response follows.

ARGUMENT

Appellant raises five interrelated arguments where he argues that he is entitled to Hurst relief. First, Appellant argues that this show cause order unlawfully denies him his right to a full briefing of his case. Second, Appellant argues that he should not be bound by this Court's Hitchcock and Asay decisions. Third, Appellant argues that Caldwell v. Mississippi[1] applies to his case because his jury was not properly

[1] Caldwell v. Mississippi, 472 U.S. 320 (1985).

instructed. Fourth, Appellant argues that the retroactive cutoff in Asay violates his Eighth Amendment right. Fifth, and last, Appellant argues that he should be permitted to reargue previously argued claims. As will be shown below, each of these arguments must be denied.

A. This Court Does Not Violate Appellant's Due Process Rights Where It Requires Appellant To Respond To A Show Cause Order.

Appellant first objects to being bound by the briefing in Asay and Hitchcock on due process grounds. Appellant's case is being given an individualized determination, and his right to appeal is not unfairly curtailed by the outcome of Hitchcock or any other capital case.[2] The Order to Show Cause is Appellant's opportunity to inform this Court why his case is distinguishable from Asay and Hitchcock.

[2] This Court's long-standing tag procedure does not violate due process. Indeed, the United States Supreme Court employs a somewhat similar procedure when dealing with numerous cases involving the same issue. It decides the lead case, and then it vacates and remands the other cases to the lower courts in light of the new decision in the lead case. This procedure is referred to as "grant, vacate, and remand" or GVR for short. Lawrence v. Chater, 516 U.S. 163, 166 (1996) ("the GVR order has, over the past 50 years, become an integral part of this Court's practice, accepted and employed by all sitting and recent Justices"); Wellons v. Hall, 558 U.S. 220, 225 (2010) (observing that "a GVR order conserves the scarce resources of this Court"). The parties in the other cases do not get to brief the issue in the High Court. In contrast, this Court allows the parties in the tag cases to brief the issue after the lead case is decided in a response to an order to show cause. While some United States Supreme Justices have criticized the GVR practice, those criticisms are on case specific grounds, **not on due process grounds**. Opposing counsel cites no case from any appellate court holding that the court's procedures for dealing with a mass of cases involving the same issue, such as tagging or GVR, violates due process.

Since Appellant has pointed to no specific fact that distinguishes his case from Asay or Hitchcock, this precedent applies to Appellant. Instead, Appellant argues that the truncated briefing order interferes with his ability to re-raise arguments such as already-litigated claims based on Strickland v. Washington, 466 U.S. 668 (1984). However, Hurst is not the vehicle through which a defendant receives this opportunity. Accordingly, this Court must deny Appellant's first argument.

B. There Is No Cause Where This Court Has Already Determine That Retroactivity Does Not Apply To Cases Like Appellant's That Were Finalized Prior To Ring v. Arizona.

In Asay, this Court held that Hurst v. State is not retroactive to any case in which the death sentence was final prior to the June 24, 2002, decision in Ring. Asay v. State, 210 So. 3d 1, 22 (Fla. 2016); Hurst v. State, 202 So. 3d 40 (Fla. 2016); Ring v. Arizona, 536 U.S. 584 (2002). This Court established a definitive guideline based on three factors to determine whether a case receives retroactive Hurst relief: 1) the purpose of the new rule; 2) reliance on the old rule; and 3) the effect on the administration of justice. Id. at 17-22. Applying the Witt test, this Court determined that based on the rule of law prior to Ring and the effect on the administration of justice, defendants whose sentences were finalized prior to Ring would not receive Hurst relief. Id. at 17-22. Thus, rather than creating an arbitrary system in deciding which defendants receive Hurst relief, the date of finality of a defendant's sentence dictated whether he or she receives Hurst relief. Id. at 22.

Accordingly, as the judgment in Asay became final on October 7, 1991, Asay was not eligible for any relief under Hurst. Asay, 210 So. 3d at 8. After Asay, this Court has continuously adhered to using the Ring decision date as the cutoff point for retroactivity. Thus far, this Court has failed to extend Hurst v. State to numerous cases, including Asay, based solely on the fact that the judgments were finalized prior to the decision in Ring.[3]

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[3] See Asay, 210 So. 3d at 8, 22 (sentence final in 1991; see Asay v. Florida, 502 U.S. 895 (1991)); Jones v. State, No. SC15-1549, 2017 WL 4296370 (Sept. 28, 2017); Hitchcock v. State, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017) (sentence final in 2000; see Hitchcock v. Florida, 531 U.S. 1040 (2000)); Zack v. State, Nos. SC15-1756, SC16-1090, 2017 WL 2590703, *5 (Fla. June 15, 2017) (sentence final in 2000; see Zack v. Florida, 531 U.S. 858 (2000)); Zakrzewski v. Jones, 221 So. 3d 1159, 1159 (Fla. 2017) (sentence final in 1999; see Zakrzewski v. Florida, 525 U.S. 1126 (1999)); Oats v. Jones, 220 So. 3d 1127, 1129 (Fla. 2017) (sentence final in 1985; see Oats v. Florida, 474 U.S. 865 (1985)); Marshall v. Jones, No. SC16-779, 2017 WL 1739246 (May 4, 2017) (sentence final in 1993; see Marshall v. Florida, 508 U.S. 915 (1993)); Rodriguez v. State, 219 So. 3d 751, 760 (Fla. 2017) (sentence final in 1993; see Rodriguez v. Florida, 510 U.S. 830 (1993)); Willacy v. Jones, No. SC16-497, 2017 WL 1033679 (Mar. 17, 2017) (sentence final in 1997; see Willacy v. Florida, 522 U.S. 970 (1997)); Suggs v. Jones, No. SC16-1066, 2017 WL 1033680, *1 (Mar. 17, 2017) (sentence final in 1995; see Suggs v. Florida, 514 U.S. 1083 (1995)); Lukehart v. Jones, No. SC16-1225, 2017 WL 1033691 (Mar. 17, 2017) (sentence final 2001; see Lukehart v. Florida, 533 U.S. 934 (2001)); Cherry v. Jones, No. SC16-694, 2017 WL 1033693, *1 (Mar. 17, 2017) (sentence final in 1990; see Cherry v. Florida, 494 U.S. 1090 (1990)); Archer v. Jones, No. SC16-2111, 2017 WL 1034409, *1 (Mar. 17, 2017) (sentence final in 1996; see Archer v. Florida, 519 U.S. 876 (1996)); Jones v. Jones, No. SC16-607, 2017 WL 1034410 (Mar. 17, 2017) (sentence final in 1995; see Jones v. Florida, 515 U.S. 1147 (1995)); Hartley v. Jones, No. SC16-1359, 2017 WL 944232, *1 (Mar. 10, 2017) (sentence final in 1997; see Hartley v. Florida, 522 U.S. 825 (1997)); Geralds v. Jones, No. SC16-659, 2017 WL 944236, *1 (Mar. 10, 2017) (sentence final in 1996; see Geralds v. Florida, 519 U.S. 891 (1996)); Lambrix v. State, 217 So. 3d 977, 989 (Mar. 9, 2017) (sentence final in 1986); Stein v. Jones, No. SC16-

On August 10, 2017, in Hitchcock, this Court reaffirmed its Asay decision:

> Although *Hitchcock* references various constitutional provisions as a basis for arguments that *Hurst v. State* should entitle him to a new sentencing proceeding, these are nothing more than arguments that *Hurst v. State* should be applied retroactively to his sentence, which became final prior to *Ring*. As such, these arguments were rejected when we decided *Asay*. Accordingly, we affirm the circuit court's order summarily denying Hitchcock's successive postconviction motion pursuant to *Asay*.

Hitchcock, No. SC17-445, 2017 WL 3431500, *2 (Fla. Aug. 10, 2017); see also Asay v. State, Nos. SC17-1400, SC17-1429, 2017 WL 3472836, *7 (Aug. 14, 2017) (rejecting the claim that chapter 2017-1, Laws of Florida, "creates a substantive right to a life sentence unless a jury unanimously recommends otherwise"); Lambrix v. State, No. SC17-1687, 2017 WL 4320637, *1 (Sept. 29, 2017) (rejecting arguments based on the Eighth Amendment, denial of due process and equal protection, and a substantive right based on new legislation).

621, 2017 WL 836806 (Mar. 3, 2017) (sentence final in 1994; see Stein v. Florida, 513 U.S. 834 (1994)); Hamilton v. Jones, No. SC16-984, 2017 WL 836807 (Mar. 3, 2017) (sentence final in 1998; see Hamilton v. Florida, 524 U.S. 956 (1998)); Davis v. State, No. SC16-264, 2017 WL 656307 (Feb. 17, 2017) (sentence final in 1998; see Davis v. Florida, 524 U.S. 930 (1998)); Bogle v. State, 213 So. 3d 833, 855 (Fla. 2017) (sentence final in 1995; see Bogle v. Florida, 516 U.S. 978 (1995)); Wainwright v. State, No. SC15-2280, 2017 WL 394509 (Jan. 30, 2017) (sentence final in 1998; see Wainwright v. Florida, 523 U.S. 1127 (1998)); Gaskin v. State, 218 So. 3d 399, 400 (Jan. 19, 2017) (sentence final in 1993; see Gaskin v. Florida, 510 U.S. 925 (1993)); see Hannon v. State, No. SC17-1837 at 15 (Nov. 1, 2017).

Finally, as recent as November 1, 2017, this Court has reiterated and reaffirmed both the holdings in Asay and Hitchcock. See Hannon v. State, Nos. SC17–1618, SC17–1837, 2017 WL 4944899, *1, *6 (Fla. Nov. 1, 2017).

In this case, Appellant's sentence became final on October 5, 1998, which is prior to the June 24, 2002 decision in Ring. As such, Hurst v. State is not retroactive to this case. Like Hitchcock, Appellant further raises various constitutional provisions to argue that Hurst v. State should be retroactively applied to him. However, just as in Asay, as reaffirmed by Hitchcock, Hurst v. State does not apply retroactively. Therefore, Appellant's argument that Hurst does apply to him must be denied.

C. Caldwell Does Not Apply To Appellant's Case.

Appellant argues that his jury was improperly instructed under Caldwell v. Mississippi, 472 U.S. 320 (1985), as to its sentencing responsibility and thus Appellant merits Hurst relief. Appellant never raised a Caldwell claim at trial or on direct appeal. Appellant first raised a Caldwell claim in his writ of habeas corpus on his first motion for postconviction relief. See Phillips v. Dugger, 515 So. 2d 227, 227-28 (Fla. 1987). This Court has already determined that Caldwell procedurally bars Appellant from relitigating it because Appellant did not timely raise this claim. Id.

This Court has denied identical claims. In Hall v. State, this Court stated "challenges to 'the standard jury instructions that refer to the jury as advisory and that refer to the jury's verdict as a recommendation violate **Caldwell v. Mississippi . . . are without merit**.'" Hall v. State, 212 So. 3d 1001, 1032-33 (Fla. 2017) (citing Dufour v. State, 905 So. 2d 42, 67 (Fla. 2005)) (emphasis added). Because the jury was instructed according to the proper law at the time as dictated in Asay, Appellant's argument is meritless.

D. The Retroactivity Cutoff In Asay Is Constitutional And Does Not Violate Appellant's Eighth Or Fourteenth Amendment Rights.

Appellant next contends that the Ring-based cutoff date that determines Hurst relief unconstitutionally violates Appellant's Eighth and Fourteenth Amendment rights. This argument is also meritless. See Hannon, 2017 WL 4944899 at *6 (finding that "Hannon chooses to ignore our precedent because he disagrees with the retroactivity cutoff that we set in Asay V, however, that decision is final . . . .").

With retroactivity, there is usually a cutoff date to provide for finality in appellate processing. Penry v. Lynaugh, 492 U.S. 302, 314 (1989) (holding finality concerns in retroactivity are applicable in the capital context). In Griffith v. Kentucky, 479 U.S. 314, 328 (1987), the Supreme Court held "that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past."

Under this "pipeline" concept, only those cases still pending on direct review would receive the benefit of relief from Hurst error. The fact that this Court has drawn the line at the decision date in Ring instead of the decision date in Hurst, benefits more capital defendants. Thus, the retroactivity cutoff does not violate the Fourteenth Amendment's guarantee of equal protection and due process.

Appellant further argues that this Court's decisions to allow partial retroactivity of Hurst v. Florida and Hurst v. State give rise to a violation of Equal Protection Clause and the Eighth Amendment. This argument is also without merit. See Hannon, 2017 WL 4944899 at *6 (finding the retroactivity cutoff date "has been impliedly approved by the United States Supreme Court, which denied certiorari review in Asay v. Florida, No. 16-9033, 2017 WL 1807588 (U.S. Aug. 24, 2017)."). Despite Appellant's claims that the result is not fair, this Court has continuously followed its precedent in Asay. Fairness does not require that Hurst v. State be applied to old cases. Inherent in the concept of non-retroactivity is that some defendants will receive the benefit of a new legal development, while others will not.[4] Drawing a line between newer cases that will receive the benefit of a new

[4] Florida is an outlier for giving **any** retroactive effect to an Apprendi/Ring based error. Moreover, the Supreme Court has not made other rules based on Apprendi retroactive to cases on collateral review. See Schriro v. Summerlin, 542 U.S. 348 at 349, 358 (2004) (determining the extension of Apprendi to judicial factfinding in Ring v. Arizona did not apply retroactively). Apprendi's rule "recharacterizing certain facts as offense elements that were previously thought to be sentencing factors" does not lay "anywhere near that central core of fundamental rules that are

development in the law and finalized cases that will not receive such benefit is part of the retroactivity analysis. See, e.g., Griffith, 479 U.S. at 328 (1987) (all new developments in criminal law must be applied retrospectively to all cases, state or federal, that are pending on direct review); Smith v. State, 598 So. 2d 1063, 1065 (Fla. 1992).

Moreover, while Appellant claims the Eighth Amendment is violated by partial retroactivity, the United States Supreme Court has acknowledged that the issue of post-conviction retroactivity, even for federal constitutional violations, is primarily a matter of state law. Danforth v. Minnesota, 552 U.S. 264, 288 (2008). In fact, there is no United States Supreme Court Eighth Amendment decision which supports Appellant's argument.

Appellant is not being treated any differently than similarly situated capital defendants. In fact, Appellant should be treated exactly the same as **similarly situated** capital defendants whose sentences of death were finalized when Ring was issued. See Asay, 210 So. 3d at 22; Hitchcock, 2017 WL 3431500. Accordingly, this Court must deny Appellant's argument that Hurst has been arbitrarily applied to him in contravention to the Eighth Amendment.

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absolutely necessary to insure a fair trial." Walker v. United States, 810 F.3d 568, 575 (8th Cir. 2016). "If Apprendi ... does not apply retroactively, then a case extending Apprendi should not apply retroactively." Hughes v. United States, 770 F.3d 814, 818 (9th Cir. 2014)

E. Hurst Does Not Breathe New Life Into Previously Decided Claims.

Last, Appellant attempts to relitigate claims this Court has previously denied under the erroneous basis that Hurst grants him additional relief. Hurst does not breathe new life into claims that this Court has already decided. Hurst is not a right to counsel case as is Strickland v. Washington, 466 U.S. 668 (1984). Hurst involves an entirely different constitutional right than Strickland. As a result, this argument was properly rejected by the court below, and this Court should affirm the denial of relief.

CONCLUSION

WHEREFORE, the Appellee, State of Florida, respectfully requests this Honorable Court to affirm the trial court's order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 22nd day of November, 2017, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: **William M. Hennis III**, Counsel for Appellant, CCRC-South, at hennisw@ccsr.state.fl.us AND ccrcpleadings@ccsr.state.fl.us.

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I HEREBY CERTIFY that the size and style of the type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Melissa J. Roca
COUNSEL FOR APPELLEE

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IN THE SUPREME COURT OF FLORIDA

HARRY FRANKLIN PHILLIPS,

Appellant,

Case No.: SC17-984

v.

STATE OF FLORIDA,

Appellee.

_____/

REPLY TO STATE'S REPLY TO ORDER TO SHOW CAUSE

The Appellant, **HARRY FRANKLIN PHILLIPS**, by and through undersigned counsel, hereby submits his reply to the Appellee's Reply to his Response to the Order to Show Cause. Mr. Phillips states:

I. Mr. Phillips has been denied due process.

In his Response, Mr. Phillips requested that this Court adhere to the Florida Rules of Appellate Procedure and permit him to fully brief the issues that were raised and arose in the circuit court. In other words, Mr. Phillips asked to be treated no differently than any appellant in a capital case whose appeal is decided by the Court under its mandatory jurisdiction. However, the State ignores the legal bases of Mr. Phillips's argument and instead attempts to analogize the substantive right to appeal to this Court with the discretionary procedure the United States Supreme Court follows when reviewing cases with similar legal issues. *See* Reply at 3, n.2.

First, as explained in his Response, Mr. Phillips has a substantive right to appeal the denial of his Rule 3.851 motion, a motion which challenged the constitutionality of his death sentence. Contrary to the State's misunderstanding of the law, that right is protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See Evitts v. Lucey*, 469 U.S. 387, 393 (1985); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). This principle applies to collateral appeals as well as direct appeals. See *Lane v. Brown*, 372 U.S. 477, 484-85 (1963). [1]

Second, the State's attempt to analogize Mr. Phillips's right to appeal with the certiorari procedure employed by the United States Supreme Court is absurd. The State claims this Court's procedure is not constitutionally problematic because it is "similar" to the Supreme Court's procedure. Reply at 3, n.2. The State fails to acknowledge that nothing in the rules of the United States Supreme Court provide for bypassing those rules even if other cases present similar (or even identical) issues for potential review. There is no truncated procedure when a litigant presents a petition for writ of certiorari that raises similar—or even identical—issues for potential review. Nor is this a "GVR" situation; in all cases in which certiorari review is sought by a litigant in the Supreme Court, the litigant is entitled to the full protection of the rules of court and can file a petition addressing all issues the litigant wishes to present for potential certiorari review. And after a "lead case" is decided,

[1] The State refuses to acknowledge *Evitts*, *Griffin,* or *Lane*.

the Supreme Court may determine that another case raising the same issue should be vacated and remanded in light of the decision in the "lead case." But by this analogy, the State is really suggesting that this Court should reverse the denial of Mr. Phillips's Rule 3.851 motion and remand to the lower court for reconsideration of its decision in light of the decision in the "lead case" (*Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017)). This does not appear to really be what the State is proposing and thus this argument appears as self-defeating as it is wrong.

Mr. Phillips's claim is not merely about the number of pages or the amount of time he has been provided to appeal the denial of his successive motion, rather it is about having his appeal heard by this Court in its own right, as it should be. Individualized appellate review of each capital appeal is required by the Florida Constitution. *See Proffitt v. Florida*, 428 U.S. 242, 258 (1976) ("The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases."). *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) ("We cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases."). Mr. Phillips maintains that requiring him to show "cause" before his appeal of right will be fully heard violates the Florida Constitution, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and the Eighth Amendment. *See*

Doty v. State, 170 So. 3d 731, 733 (Fla. 2015) ("[T]his Court has a mandatory obligation to review all death penalty cases to ensure that the death sentence is imposed in accordance with constitutional and statutory directives."). Mr. Phillips must be given a fair opportunity to establish that his death sentence is unconstitutional. *See Hall v. Florida*, 134 S.Ct. 1986 (2014).

Additionally, the State asserts that "Appellant has pointed to no specific fact that distinguishes his case from Asay or Hitchcock," *see* Reply at 4, but this is simply wrong. Mr. Phillips has raised issues not addressed in *Hitchcock* and *Asay* as set out in his Response and more fully below. The State's arguments lack merit and should be rejected.

II. The State ignores that Mr. Phillips's individual claims were not addressed in *Asay* or *Hitchcock*.

Initially, it should be noted that the State's Reply purports to respond to Mr. Phillips's arguments, but, for the most part, avoids and/or ignores much of Mr. Phillips's argument. The State's failure to differentiate between the United States Supreme Court's opinion in *Hurst v. Florida* and this Court's opinion in *Hurst v. State* results in a confusing and misleading Reply that raises more questions than it answers, thus supporting the need for full briefing.

The State contends that Mr. Phillips is disentitled to relief from his death sentence in light of *Asay v. State*, 210 So.3d 1 (Fla. 2016), and *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), *certiorari petition pending*, *Hitchcock v. Florida*, Case

No. 17-6180. The State erroneously relies on *Asay v. State*, 210 So. 3d 1(2016), to argue *Asay* controls Mr. Phillips's claims premised upon *Hurst v. State*. However, the passage cited to in the *Asay* opinion related to this Court's analysis of the retroactivity of *Hurst v. Florida*, not *Hurst v. State*. *See* Reply at 4, *citing Asay*, 210 So. 3d at 17-22. The State's argument ignores the fact that Mr. Asay only raised a challenge based upon *Hurst v. Florida*. *Hurst v. State* had not even been decided when Mr. Asay's briefing and argument were conducted. More importantly, *Hurst v. State* was decided on Sixth **and** Eighth Amendment grounds, in addition to Florida constitutional grounds. Therefore *Asay* cannot control Mr. Phillips's claims concerning the retroactivity of *Hurst v. State* that were raised in his Rule 3.851 motion.[2]

Furthermore, the State erroneously relies on *Lambrix v. Sec'y, Fla. Dep't of Corr*., 2017 WL 4416205 (11th Cir. Oct. 5, 2017), to argue Mr. Phillips's Eighth Amendment, Due Process, and Equal Protection claims have already been addressed and rejected. *See* Reply at 6. First, the 11th Circuit's opinion holds no precedential value because the issue before the 11th Circuit concerned its determination whether to grant a review on the merits as compared to a ruling on the merits. *See Buck v.*

[2] The State's citation to 24 cases where "this Court has failed to extend Hurst v. State to numerous cases, including Asay" on the basis of the decision date in *Ring* is misleading. *See* Reply at 5-6, n.3. In at least 8 of the cases the State relies upon, including *Asay*, the appellant/petitioner did not challenge his death sentence on the basis of *Hurst v. State*.

Davis, 137 S.Ct. 759, 773 (2017). More importantly, *Lambrix* dealt with an idiosyncratic issue—the "retroactivity" of Florida's new capital sentencing statute—and did not squarely address the retroactivity of the constitutional rules arising from the *Hurst* decisions. Similar idiosyncratic presentations also render inapplicable to Mr. Phillips this Court's recent active-death-warrant decisions in *Asay v. State*, 224 So. 3d 695 (Fla. 2017), and *Hannon v. State*, 2017 WL 4944899 (Fla. Nov. 1, 2017).

The State contends this Court has already determined that Mr. Phillips's *Caldwell*[3] claim is procedurally barred. *See* Reply at 7. The State's reliance on *Phillips v. Dugger*, 515 So. 2d 227, 227-28 (Fla. 1987) to support its position is as misleading as it is erroneous. While the State acknowledges the penalty phase at issue occurred in **1994**, *see* Reply at 1, the State nonetheless relies on jury instructions that were given in **1983** before this Court granted Mr. Phillips a new sentencing phase. *See Phillips v. State*, 608 So. 2d 778 (Fla. 1992). As Mr. Phillips thoroughly explained in his Response, *see* Response at 11-14, only the **1994** jury instructions are relevant to his *Caldwell* claim. The State's argument is nonresponsive and must be rejected.

The State's reliance on *Hall v. State*, 212 So. 3d 1001 (Fla. 2017), for the proposition that this Court has already addressed and rejected claims premised upon

[3] *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

Caldwell is likewise erroneous. *See* Reply at 8. First, this Court did not address "a Caldwell claim in the context of Hurst relief…" in *Hall v. State* as the State suggests. *Id*. A cursory review of Mr. Hall's briefing demonstrates that Mr. Hall never filed any arguments on the basis of either *Hurst* decision. *See* Motion for Rehearing at 1-2, *Hall v. State*, Case No. SC15-1662 & SC16-224. Given that it is neither possible nor permissible for this Court to reject arguments that were never made, the State's argument is legally flawed. Second, three justices of the United States Supreme Court recently noted that this Court's review of appeals related to *Hurst v. Florida* and the issues arising in its wake has been woefully deficient. *See Truehill v. Florida*, 2017 WL 2463876 (October 16, 2017) (Sotomayor, J., dissenting, joined by Breyer and Ginsburg, JJ.) ("capital defendants in Florida have raised an important Eighth Amendment challenge to their death sentences that the Florida Supreme Court has failed to address."). Accordingly, the State's argument that Mr. Phillips's *Caldwell* claim lacks merit must be denied.

The State also fails to acknowledge that the relevant "lead case" (*Hitchcock*) did not address the applicability of *Caldwell.* Rather, the State simply asserts that Mr. Phillips's "jury was instructed according to the proper law at the time as dictated in Asay." Reply at 8. But that is precisely the point. The "law at the time" has now been held to be unconstitutional. And more importantly, in the wake of *Hurst v. Florida* and the resulting new Florida law, a jury's **unanimous** death

recommendation is necessary in order to authorize the imposition of a death sentence. After *Hurst v. Florida*, the jury's penalty phase verdict is no longer advisory and the jury bears the responsibility for a resulting death sentence. Additionally, the individual jurors must know that each has the power to exercise mercy by simply voting against a death recommendation. The State's blanket statement ignores the fact that Mr. Phillips's jury, who heard faulty evidence and instructions, returned an advisory death recommendation by a mere **7-5**. The State's Reply amply demonstrates that Mr. Phillips is not receiving the individualized appeal that the Eighth Amendment requires.

As to Claim III, the State misconstrues Mr. Phillips's argument and misguidedly attempts to analogize a *Ring*-based retroactivity cutoff to more standard-fare rulings that provide for prospective application, but no retroactive application. *See* Reply at 8, *citing Griffith v. Kentucky*, 479 U.S. 314 (1987).[4] Mr. Phillips does not dispute that a valid pragmatic necessity exists for finality, rather Mr. Phillips argues that the *Ring* cutoff injects a level of arbitrariness that far exceeds

[4] The State contends the "pipeline concept" created in *Griffith v. Kentucky*, 479 U.S. 314 (1987) supports its argument. *See* Reply at 8-9. While the "pipeline concept" places the dividing line between final and non-final, that is clearly not what has occurred in Florida. Indeed, many capital defendants whose convictions were final when *Hurst v. Florida* was decided have been granted the benefits of *Hurst v. Florida* and *Hurst v. State*.

the level justified by normal retroactivity rules.[5] *See* Response at 17-18. Given the Eighth Amendment's concern with "the risk that [a death] sentence will be imposed arbitrarily," this Court's line-drawing contravenes the United States Supreme Court's mandate that States have a constitutional responsibility to tailor and apply their laws in a manner that avoids the arbitrary and capricious infliction of the death penalty. *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988); *see* also, *Furman v. Georgia*, 408 U.S. 238 (1972).

Additionally, the State's reliance on *Danforth v. Minnesota*, 552 U.S. 264 (2008) to support its claim that limited retroactivity does not violate the Eighth Amendment, perverts the meaning of *Danforth*. *Danforth* stands for the proposition that states may choose to provide **more** protection than federal law requires. However, *Danforth* does not permit states to create state law that contravenes federal law, as the State suggests. *See* Reply at 10.

The State's Reply to Claim IV of Mr. Phillips's argument is simply incomprehensible. *See* Reply at 11. The State contends Mr. Phillips's argument was

[5] The State's reliance on *Summerlin* is equally unpersuasive here. *See* Reply at 9, n.4. *Summerlin*—a Sixth Amendment right-to-jury-trial issue, involving Arizona's statute, did not address any of the constitutional issues arising under *Hurst v. State*, the Eighth Amendment or the Florida Constitution. In addition, *Summerlin* itself acknowledged that if the Court "[made] a certain fact essential to the death penalty . . . [the change] would be substantive." 542 U.S. at 354. The State fails to acknowledge that such a change occurred in *Hurst v. State* when this Court explicitly made unanimity a "fact essential to the death penalty."

properly rejected below because "Hurst is not a right to counsel case as is Strickland v. Washington, 466 U.S. 688 (1984). Hurst involves an entirely different constitutional right than Strickland." *Id*. Not only does the State mischaracterize Mr. Phillips's argument as a *Strickland* claim, but the State also erroneously leaves the impression that the circuit court relied on this rationale in denying relief below. In reality, the circuit court found Mr. Phillips's previously litigated *Atkins* claim was "denied without prejudice giving the Defendant leave to timely file." ROA. at 263-264. More importantly, the State fails to explain how *Hitchcock v. State* governs Mr. Phillips's claim. As Mr. Phillips explained, after *Hurst v. State*, prejudice and materiality analyses must now contemplate whether a single juror would be persuaded to vote for a life sentence, as that would change the outcome and mandate a life sentence. *See* Response at 19-20. In light of Mr. Phillips's 7-5 death recommendation, if a resentencing were granted, the unpresented evidence could certainly "sway[] one juror to make a critical difference." *See Bevel v. State*, 221 So. 3d 1168, 1182 (2017).

WHEREFORE, Mr. Phillips submits that *Hitchcock v. State* does not govern and that he should be permitted to fully brief the specific claims raised in his Rule 3.851 motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been filed through the Florida State Courts e-filing portal which electronically sent a copy to Melissa Roca, Assistant Attorney General, on November 30, 2017.

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